

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
STATE OF NEBRASKA

IN THE MATTER OF THE PROPOSED RULES)
REGARDING THE DETERMINATION OF)
FULLY APPROPRIATED RIVER BASINS)
PURSUANT TO NEB. REV. STAT. 46-713)
TO BE INCLUDED IN TITLE 457 OF THE)
NEBRASKA ADMINISTRATIVE CODE)

ORIGINAL

Holiday Inn Convention Center
South 2nd Avenue
Kearney, NE 68847

- - -

Convened, pursuant to notice at 9:00 a.m. on August
11, 2005,

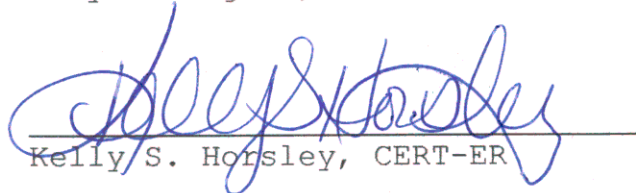
BEFORE:

ANN DIERS, Hearing Officer.

- - -

I, Kelly S. Horsley, hereby certify that this
volume contains Exhibits 1 through 50 offered and
received in evidence in the above-referenced proceedings,
heard August 11 2005, and the same are made part of the
transcript prepared in said case.

Dated this 15th day of August, 2005.


Kelly S. Horsley, CERT-ER

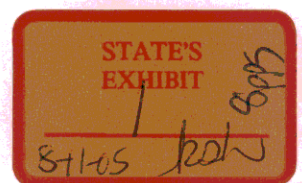
ACE Reporting, NE
(402) 416-4882

NEBRASKA ADMINISTRATIVE CODE

TITLE 457 – DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

ALPHABETICAL TABLE OF CONTENTS

<u>SUBJECT OF TITLE</u>	<u>STATUTORY AUTHORITY</u>	<u>CODE SECTION</u>
Applications for New Water Appropriations	§ 46-241 § 46-242 § 61-206	002
Authority to Levy Fees	§ 46-206 § 46-207 § 46-2,101 § 46-2,102	017
Change of Address	§ 46-230 § 61-206	005
Change of Ownership of Appropriation	§ 46-230 § 61-206 § 76-2,124	004
Changing Point of Diversion	§ 46-250 § 61-206	006
Claims	§ 46-202 § 61-206 § 84-909(1)	014
Dam Hazard Classification	§ 46-257 § 61-206	019
Definitions	§ 46-250 § 61-206	001



<u>SUBJECT OF TITLE</u>	<u>STATUTORY AUTHORITY</u>	<u>CODE SECTION</u>
<u>Determination of Fully Appropriated Basins, Sub-Basins or Reaches</u>	§ 46-713	024
Engineering Drawings and Specifications for Dams	§ 46-257 § 61-206	012
Height of Dam	§ 33-105 § 61-206	008
Incidental and Intentional Underground Water Storage	§ 46-226.01 § 46-297 § 61-206	016
Induced Ground Water Recharge	§ 46-233 § 46-235 § 61-206 § 61-207	022
Instream Flows	§ 46-2,110 § 46-2,114 § 61-206 § 61-207	018
Moratorium Area Variances	§ 46-714 § 61-206	023
Outlet Works	§ 46-241 § 61-206	013
Permit to Conduct Water in Stream Channels	§ 46-252 § 61-206 § 61-207	021
Project Maps for the Impoundment of Water	§ 46-237 § 46-241 § 61-206	011
Project Maps for the Use of Water	§ 46-237 § 46-294 § 61-206	010
Relinquishments	§ 61-206	003

2
1-2

SUBJECT OF TITLE

STATUTORY
AUTHORITY

CODE
SECTION

Temporary Use Permits

§ 46-233

020

§ 61-206

Theoretical Horsepower

§ 33-105

007

§ 61-206

Transfer the Location of Use

§§ 46-290 – 294

009

§ 61-206

NEBRASKA ADMINISTRATIVE CODE

TITLE 456 – DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

NUMERICAL TABLE OF CONTENTS

<u>SUBJECT OF TITLE</u>	<u>STATUTORY AUTHORITY</u>	<u>CODE SECTION</u>
Definitions	§ 46-250 § 61-206	001
Applications for New Water Appropriations	§ 46-241 § 46-242 § 61-206	002
Relinquishments	§ 61-206	003
Change of Ownership of Appropriation	§ 46-230 § 61-206 § 76-2,124	004
Change of Address	§ 46-230 § 61-206	005
Changing Point of Diversion	§ 46-250 § 61-206	006
Theoretical Horsepower	§ 33-105 § 61-206	007
Height of Dam	§ 33-105 § 61-206	008
Transfer the Location of Use	§§ 46-290 – 294 § 61-206	009

<u>SUBJECT OF TITLE</u>	<u>STATUTORY AUTHORITY</u>	<u>CODE SECTION</u>
Project Maps for the Use of Water	§ 46-237 § 46-294 § 61-206	010
Project Maps for the Impoundment of Water	§ 46-237 § 46-241 § 61-206	011
Engineering Drawings and Specifications for Dams	§ 46-257 § 61-206	012
Outlet Works	§ 46-241 § 61-206	013
Claims	§ 46-202 § 61-206 § 84-909(1)	014
Incidental and Intentional Underground Water Storage	§ 46-226.01 § 46-297 § 61-206	016
Authority to Levy Fees	§ 46-206 § 46-207 § 46-2,101 § 46-2,102	017
Instream Flows	§ 46-2,110 § 46-2,114 § 61-206 § 61-207	018
Dam Hazard Classification	§ 46-257 § 61-206	019
Temporary Use Permits	§ 46-233 § 61-206	020
Permit to Conduct Water in Stream Channels	§ 46-252 § 61-206 § 61-207	021

<u>SUBJECT OF TITLE</u>	<u>STATUTORY AUTHORITY</u>	<u>CODE SECTION</u>
Induced Ground Water Recharge	§ 46-233 § 46-235 § 61-206 § 61-207	022
Moratorium Area Variances	§ 46-714 § 61-206	023
<u>Determination of Fully Appropriated Basins, Sub-Basins or Reaches</u>	§ 46-713	024

NEBRASKA ADMINISTRATIVE CODE

Title 457 - DEPARTMENT OF NATURAL RESOURCES RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR REACHES

001 FULLY APPROPRIATED. Pursuant to Neb. Rev. Stat. § 46-713(3) (Reissue 2004, as amended), a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources determines that then-current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

001.01 For purposes of Section 46-713(3)(a), the surface water supply for a river basin, subbasin, or reach shall be deemed insufficient, if, after considering the impact of the lag effect from existing groundwater pumping in the hydrologically connected area that will deplete the water supply within the next 25 years, it is projected that during the period of May 1 through September 30, inclusive, any irrigation right will be unable to divert sufficient surface water to meet on average eighty-five percent of the annual crop irrigation requirement, or, during the period of July 1 through August 31, inclusive, will be unable to divert sufficient surface water to meet at least sixty-five percent of the annual crop irrigation requirement.

For purposes of this rule, the "annual crop irrigation requirement" will be determined by the annual irrigation requirement for corn. This requirement is based on the average evapotranspiration of corn that is fully watered to achieve the maximum yield and average amount of precipitation that is effective in meeting the crop water requirements for the area.

The availability of stream flow will be based on the percentage of time junior rights were able to divert water during the previous 20 year period and the projected impacts of depletions on stream flow from existing wells over the next 25 years.

In the event that the junior water rights are not irrigation rights, the Department will utilize a standard of interference appropriate for the use, taking into account the purpose for which the appropriation was granted.

Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan adopted for a river basin, subbasin or reach determined to be fully appropriated under this rule. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and ground water uses.

001.02 The geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected for the purpose prescribed in Section 46-713(3) is the area within which pumping of a well for 50 years will deplete the river or a base flow tributary thereof by at least 10% of the amount pumped in that time.

002 INFORMATION CONSIDERED. For making preliminary determinations required by Neb. Rev. Stat. Section 46-713 (Reissue 2004, as amended) the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:

Surface water administrative records

Department Hydrographic Reports

Department and United States Geological Survey stream gage records

Department's registered well data base

Water level records and maps from Natural Resources Districts, the Department, the University of Nebraska, the United States Geological Survey or other publications subject to peer review

Technical hydrogeological reports from the University of Nebraska, the United States Geological Survey or other publications subject to peer review

Ground water models

Current rules and regulations of the Natural Resources Districts

The Department shall review this list periodically, and will propose amendments to this rule as necessary to incorporate scientific data and information that qualifies for inclusion in this rule, but was not available at the time this rule was adopted.

2
1-8

STATE OF NEBRASKA

DEPARTMENT OF
NATURAL RESOURCES
PUBLIC HEARING

NOTICE is hereby given that the Nebraska Department of Natural Resources will hold a rulemaking hearing pursuant to Neb. Rev. Stat. § 84-907 on the 11th day of August, 2005, at 9:00 a.m., to be held at the Holiday Inn Convention Center, 110 2nd Avenue, Kearney, Nebraska.

The purpose of the hearing is to take testimony and evidence about amendment of Title 457, entitled Rules for Surface Water, to include a new Chapter 24 regarding Rules Regarding the Determination of Fully Appropriated River Basins pursuant to Neb. Rev. Stat. § 46-713. The subject matter and scope of the rulemaking action is:

These rules are a result of the passage of LB 962 § 53(1)(d) (Neb. Rev. Stat. § 46-713) which requires the Department of Natural Resources (the "Department") to specify by rule and regulation the types of scientific data and other information that will be considered for making the preliminary determination as to whether a river basin, subbasin or reach presently is full appropriated without the initiation of additional uses. These rules also establish, pursuant to Neb. Rev. Stat. § 46-748, the criteria the Department will use for making the determination of fully appropriated, and the determination of the geographic area within which surface water and ground water are hydrologically connected. The Department established a negotiated rulemaking committee relating to these proposed rules. The committee met a total of seven times, but was unable to reach consensus on the proposed rules. These rules impact all portions of Nebraska that are not presently designated as fully appropriated or overappropriated. They could also impact those portions of the state that are now so designated if a reevaluation of any of those designations is performed pursuant to Section 46-713(2).

Draft or working copies of the proposed rules are available for public inspection at the offices of the Secretary of State, Regulations Division, Room 343, State Capitol, Lincoln, NE 68509 and the Department of Natural Resources, 301 Centennial Mall South, Lincoln, NE 68509. There is no expected fiscal impact from the amendment of these regulations on state agencies, political subdivisions, or persons regulated.

All interested persons may attend and testify orally or by written submission at the hearing. Interested persons may also submit written comments prior to the hearing which will be made part of the hearing record at the time of hearing if received by the Department of Natural Resources on or before August 11, 2005. Individuals with disabilities may request auxiliary aids and service necessary for participation by contacting the Administrative Officer at P.O. Box 94676, Lincoln, NE 68509-4676, (402) 471-2363, by August 9, 2005.

PROOF OF PUBLICATION

AFFIDAVIT

State of Nebraska, County of Douglas, ss:

Michelle Revis

....., being duly sworn, deposes and says that he is an employee of The Omaha World-Herald, a legal daily newspaper printed and published in the county of Douglas and State of Nebraska, and of general circulation in the Counties of Douglas and Sarpy and State of Nebraska, and that the attached printed notice was published in the said newspaper on the day of JULY A. D., 20 .05., and that said newspaper is a legal newspaper under the statutes of the State of Nebraska. The above facts are within my personal knowledge. The Omaha World-Herald has an average circulation of . 192,600 daily 242,964 Sunday, in 20 .05.

(Signed)

Title: Advertising

Subscribed in my presence and sworn to before me this day of JULY 20 .05

RECEIVED

JUL 13 2005

DEPARTMENT OF
NATURAL RESOURCES

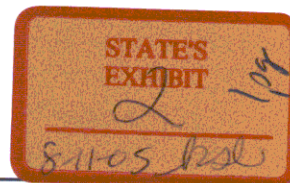
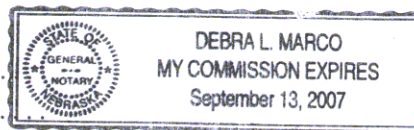
Debra L. Marco

Notary Public

Printer's Fee \$. 383.16

Affidavit

Paid by



313-G8-007

STATE OF NEBRASKA

GOVERNOR'S POLICY RESEARCH OFFICE

Lauren L. Hill
Director
P.O. Box 94601
Lincoln, Nebraska 68509-4601
Phone (402) 471-2414
Fax (402) 471-2528



Mike Johanns
Governor

FACSIMILE TRANSMISSION FORM

DATE:

6/28/05

TO:

Name

ANN DIERES / DAVE VOLLER

Agency/Co

DNR

Phone

Fax

RECEIVED

JUN 28 2005

DEPARTMENT OF
NATURAL RESOURCES

FROM:

Name

State of Nebraska

Governor's Policy Research Office

PO Box 94601

Lincoln, Ne 68509-4601

Phone: 402-471-2414 2512

Fax: 402-471-2528

TOTAL NUMBER OF PAGES INCLUDING COVER PAGE: 2

☒ Per your request
☐ Urgent

☐ Please Review
☐ For your information

COMMENTS:

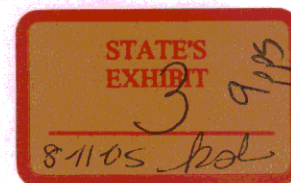
SEE ATTACHED

IF YOU DO NOT RECEIVE ALL PAGES INDICATED ABOVE OR HAVE ANY
PROBLEMS WITH THE TRANSMISSION, CALL 402-471-2414.

An Equal Opportunity/Affirmative Action Employer

Printed with soy ink on recycled paper

Received Time Jun. 28. 4:03PM



SUBMIT TO GOVERNOR BEFORE PUBLIC HEARING DATE IS SET

RULES AND REGULATIONS POLICY PRE-REVIEW CHECKLIST

Agency: Department of Natural Resources
Title, Chapter of Rules submitted: Title 457, Chapter 24: Rule Pursuant to Neb. Rev. Stat. § 46-713
Date submitted to Governor: June 23, 2005

Projected dates for public hearings August 1, 2005

Projected deadline for final approval August 8, 2005

☒ A copy of the section of laws or federal regulations that triggered these changes is attached.

FOR GOVERNOR'S OFFICE RECORDS

Advisor Assigned: JOHN ERICKSON
Date approved to proceed: 6/28/2005
Options for proceeding: SEE BELOW

- ☐ a) No further contact with GPRO is necessary until final rules have been approved by the Attorney General.
- ☒ b) Contact Governor through GPRO concerning issues raised in Negotiated Rulemaking procedures.
- ☐ c) **Submit Rules and Regulations Policy Review Checklist to Governor if rules are changed hereafter and a new public hearing is scheduled.**
- ☒ d) Keep the Governor informed through GPRO as issues arise in negotiations, drafting sessions, advisory board meetings, and public hearings.
- ☐ e) Specific policy comments per Governor's instructions is attached.

SUBMIT TO GOVERNOR BEFORE PUBLIC HEARING DATE IS SET

RULES AND REGULATIONS POLICY PRE-REVIEW CHECKLIST

Agency: Department of Natural Resources
Title, Chapter of Rules submitted: Title 457, Chapter 24: Rule Pursuant to Neb. Rev. Stat. § 46-713
Date submitted to Governor: June 23, 2005

Projected dates for public hearings August 1, 2005

Projected deadline for final approval August 8, 2005

☒ A copy of the section of laws or federal regulations that triggered these changes is attached.

FOR GOVERNOR'S OFFICE RECORDS

Advisor Assigned: _____

Date approved to proceed: _____

Options for proceeding: _____

- ☐ a) No further contact with GPRO is necessary until final rules have been approved by the Attorney General.
- ☐ b) Contact Governor through GPRO concerning issues raised in Negotiated Rulemaking procedures.
- ☐ c) **Submit Rules and Regulations Policy Review Checklist to Governor if rules are changed hereafter and a new public hearing is scheduled.**
- ☐ d) Keep the Governor informed through GPRO as issues arise in negotiations, drafting sessions, advisory board meetings, and public hearings.
- ☐ e) Specific policy comments per Governor's instructions is attached.

RULES AND REGULATIONS POLICY REVIEW CHECKLIST

A. Policy Changes and Impacts

1. What do the rules do and whom do they impact?

These rules are a result the passage of LB 962 in 2004. Rule 002 is the result of Section 53(1)(d) of that act (now Neb. Rev. Stat. Section 46-713(1)(d), which requires the Department of Natural Resources (the "Department") to specify by rule and regulation the types of scientific data and other information that will be considered for making the preliminary determination as to whether a river basin, subbasin or reach presently is fully appropriated without the initiation of additional uses. Both Rule 001 and Rule 002 directly will impact all portions of Nebraska that are not presently designated as fully appropriated or overappropriated. They could impact those portions of the state that are now so designated if a reevaluation of any of those designations is performed pursuant to Section 46-713(2). They also could indirectly affect the preparation of the integrated management plans in any designated basin, including those that already have that status.

The Department is required to complete annual evaluations of the expected long-term availability of hydrologically connected water supplies in each of the state's river basins, and to issue a report that describes the results of the evaluations, including the Department's conclusion as to whether the river basin is fully appropriated, on January 1 of each year beginning in 2006. The consequences of the Department issuing a report containing a preliminary determination that a river basin is fully appropriated include the issuance of stays on (1) the issuance of any new natural-flow, storage, or storage-use appropriations, (2) the issuance of water well construction permits, (3) the construction of any new water well if construction has not commenced prior to the determination, and (4) the use of an existing water well or an existing surface water appropriation to increase the number of acres historically irrigated. A further consequence of such report/determination is the requirement to hold hearings prior to a final determination of fully appropriated, and, if such final determination is made, the requirement that the NRD and the Department develop an integrated management plan to take effect within three to five years of the final determination.

Brief description of the proposed rule and their impacts on local and state government, citizens, and regulatees. Analyze briefly the likely impact if rules are implemented.

2. Describe changes being proposed to current policy and briefly provide rationale.

As well as specifying the types of scientific data and other information that will be considered by the Department, this rule establishes the criteria the

Department will use for making the determination of fully appropriated, and the determination of the geographic area in which surface water and ground water are hydrologically connected. While LB 962 did not require the Department to promulgate rules relating to those criteria, the Petition for Use of Negotiated Rulemaking Committee filed with the Department on August 20, 2004, argued that the Department was required to develop rules and regulations establishing such criteria. Further, Neb. Rev. Stat. § 46-748 authorizes the Department to adopt and promulgate such rules and regulations as are necessary to discharge the department's duties.

There are no current criteria for determining a basin, subbasin, or reach to be fully appropriated, and, prior to LB 962, there was no requirement that the Department make such a determination. The criteria in the proposed rule, in this regard, are new.

LB962 provides for the designation of both "overappropriated" and "fully appropriated" basins. The proposed rule applies only to the designation of fully appropriated basins. However when the one-time designation of the overappropriated basins was made in September of 2004, the Department considered surface water and ground water for the purposes of that designation to be hydrologically connected in the area within which pumping of a well for 40 years will deplete the river or a base flow tributary thereof by at least 28% of the amount pumped in that time. In the initial determination of fully appropriated made in 2004, which were required based on Section 60 of LB 962 and which provided for transition of proceedings under prior law, the Department concluded, with one exception (based on lack of information), that any area subject to a planning process for hydrologically connected resources at the time the new law went into effect should continue that planning process under the new law. As a result, land area outside of the 28% in 40 year lines are now considered fully appropriated in several natural resources districts. During the Negotiated Rulemaking Process, several different criteria were proposed. Those included the following: 28% in 40 years; 10% in 50 years; 1% in 50 years; and 1% in 100 years. In the draft rule (001.02, the Department proposes that surface water and ground water be considered as hydrologically connected in the area within which pumping of a well for 50 years will deplete the river or a base flow tributary thereof by at least 10% of the amount pumped in that time. The Department arrived at the different threshold criteria as a result of the Negotiated Rulemaking process instituted for this rule. It is notable that the 10% in 50 years stream depletion line is a compromise between the various proposals. Consensus on this issue was not reached in the Negotiated Rulemaking process. Consensus also was not reached on the portion of the proposed rule (001.01) that relates to the water supply that will trigger the fully appropriated determination.

3. Why are the rules necessary? What happens if these rules are not promulgated or amended?

Rule 002 of these rules is needed in order for the Department to implement the new requirement of LB 962 (2004). If that rule is not adopted, the annual report and determinations required to be made by January 1 of each year beginning January 1, 2006, will not be possible, and the Department will not be in compliance with the requirements of § 46-713. If Rule 001 is not adopted, the Department will either have to go forward with the report without supporting rules (contrary to the arguments made in the Petition for Use of Negotiated Rulemaking Committee) or will not complete its report and therefore not be in compliance with the requirements of Section 46-713.

B. Why is the rule necessary? What happens if these rules are not adopted?

- ☐ 1. Update of regulations (repeal of obsolete statutes, reflect current policy, editing or technical language changes, etc.)
- ☐ 2. Annual changes -- cost of living, hunting season schedules, etc.
- ☒ 3. Law was changed -- federal ☐ or state ☒
- ☐ 4. Extension of established policy or program, new initiatives or changes in policy (within statutory authority)
- ☐ 5. Constituent initiated
- ☐ 6. Financial needs -- increases/decreases in fees
- ☐ 7. Litigation requires changes in rules
- ☐ 8. Addresses legal or constitutional concerns of Attorney General's office
- ☐ 9. Implements federal or court mandate
- ☐ 10. Other (explain)

If at least Rule 002 is not adopted, the Department will not be able to comply with the mandate in § 46-713 that it issue an annual report by January 1 of each year beginning January 1, 2006.

C. Policy Checklist

- ☐ No ☐ 1. Is this an annual or editorial change reflecting essentially no change in policy?
- ☐ Yes ☐ 2. Does the policy in the proposed rules reflect legislative intent?
- ☐ No ☐ 3. Is this a state mandate on local government? Is it funded?
- ☐ No ☐ 4. Is this a federal mandate on local government? Is it funded?
- ☐ No* ☐ 5. Will it require additional or decreased resources -- funds, personnel or FTE?
- ☐ Yes** ☐ 6. Have initial contacts been made with potential citizens or organizations that may be affected?
- ☐ No ☐ 7. Does the policy impact another agency? What are the concerns? How have they been addressed?
- ☐ Yes*** ☐ 8. Does it reduce or increase reporting requirements of businesses?

* While the rule itself does not require additional resources, it is possible that

the issuance of annual reports by the Department, in that they could result in a requirement that hearings be held and the development of integrated management plans, will increase the workload of the Department.

** That Department was requested to, and did, enter into a Negotiated Rulemaking Process relating to this rule. All who requested to be a member of the Negotiated Rulemaking Committee were invited to, and did, participate in the Committee meetings. This included representatives of Nebraska well drillers, public power and irrigation districts, the League of Municipalities, the Nebraska Groundwater Management Coalition, the City of Lincoln, instream flow appropriators, the Nebraska Game and Parks Commission, small municipalities, the City of Ashland, Nebraska Farm Bureau Federation, Nebraska State Irrigation Association, Natural Resources Districts, American Rivers, the Nebraska Wildlife Federation, Nebraska Association of Resources Districts, Nebraska Republican River Management Districts Association, surface water users, and irrigation districts. The Committee met a total of seven times. The Water Policy Task Force members were invited to attend the final meeting, scheduled for June 28th.

*** While the rule itself does not increase reporting requirements, if an area is determined to be fully appropriated, and adopts an integrated management plan, the integrated management plan could require additional reporting.

Fiscal impact - There will be no fiscal impact from this proposal. If the Department issues an annual report including a determination that a basin is fully appropriated, there will be fiscal impact associated with (a) the process of making a final determination that the basin is fully appropriated, and (b) the process of developing an integrated management plan for a fully appropriated area. Those impacts were anticipated and are provided for in the appropriations for FY 06. Legislative intent indicates that for the future, new sources of revenue need to be identified to cover the costs of implementing LB962, including those that will result from the decisions made pursuant to this proposed rule.

FTE - Similarly, there will be no fiscal impact from this proposal; however, a report that includes a determination that a basin is fully appropriated will result on increased workload for the Department and its employees. Whether that increased workload will require additional FTE is unknown at this time, but if it does, it should be covered for FY 06 by existing appropriations.

D. Unique problems or issues and recommendations for the Governor

The Negotiated Rulemaking Committee did reach a consensus on that portion of the proposed rule relating to the types of data and other information that will be

considered for making the preliminary determination required by Section 46-713. However, as noted earlier, the Committee did not achieve consensus on the balance of the proposed rule relating to criteria to be used for making the determinations and for identifying the geographic area within which surface water and ground water will be considered to be hydrologically connected for purposes of that determination. The members of the Committee had strong reasons in support of and opposition to the various criteria that were considered by the Committee.

- E. Who is expected to be affected, or to oppose or support this approach to the rules? Have initial informal contacts been made with organizations or citizens who may be affected? How do you plan to inform them and secure their input?

At least one organization, the Nebraska Association of Resources Districts, has indicated that it will oppose use of anything but the 28% in 40 years line for designation of the area in which surface water and ground water are hydrologically connected for purposes of the fully appropriated determination. The Nebraska Association of Resources Districts was represented on the Negotiated Rulemaking Committee, and provided input during the Committee meetings. It became apparent during the meetings of the Negotiated Rulemaking Committee that members of the Committee differed in their opinions of the criteria the Department should consider in determining the geographic area in which surface and ground water are hydrologically connected, and that those differences of opinion were often based on where the line would be drawn, rather than the basis behind the drawn line. This is an issue on which there will continue to be a difference of opinion.

Surface water users may oppose the rule for the opposite reason, i.e., that using the 10% in 50 year line does not provide adequate protection for them. That was their position in the Negotiated Rulemaking process.

Environmental interests, and the Nebraska Game and Parks Commission, would oppose the rule in favor of a more stringent criteria, e.g., 1% in 50 years, or 2.5% in 50 years.


- F. Are these proposed rules a likely candidate for negotiated rulemaking? Explain. Has the process been completed? If so, explain how the issues were addressed. Enclose a copy of the public notice of public hearing required in LB 446.

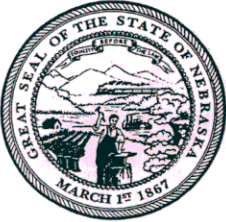
The Department received a Petition for Use of Negotiated Rulemaking Committee, and duly published Notice of Intent to establish a Negotiated Rulemaking Committee. All persons who applied for membership on the Committee were accepted on the Committee. The process will be complete following the Committee meeting scheduled for June 28th. At that point, the Committee will have met seven times. The Committee has not been able to reach consensus on all parts of the proposed rule, and it is not anticipated that consensus will be reached as a result of the June 28th meeting. Members of the Water Policy Task Force have been invited to attend the final meeting of the Committee, at which the Department plans to

make a presentation on some of the materials the Committee considered, and the Department's preferred draft of the rule.

Director's Verification of Review

I have reviewed these proposals and verify that, at this stage of rules development, these questions have been accurately addressed.

Director's Signature  Date 6/23/05



Dave Heineman
Governor

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES
Roger K. Patterson
Director

IN REPLY TO:
Hand Delivered
July 8, 2005
ADD

The Honorable John Gale
Secretary of State
State Capitol, Suite 2300
P.O. Box 94608
Lincoln, NE 68509-4608

RE: Proposed New Rules and Regulations for Title 457 NAC 24—Rule Regarding the Determination of Fully Appropriated River Basins.

Dear Mr. Gale:

Enclosed is a copy of a working draft of rules and regulations being proposed by the Nebraska Department of Natural Resources. These rules and regulations are being proposed in order to implement the provisions of Legislative Bill 962, Section 53, (2004), codified at Neb. Rev. Stat. § 46-713 which provides for the adoption and promulgation of rules by the Department regarding the scientific data and other information used to determine whether a river basin, sub-basin or reach is fully appropriated.

The Department will conduct a public hearing on the proposed rules at 1:00 p.m., Thursday, August 11, 2005 at 9:00 a.m., in Kearney, Nebraska.

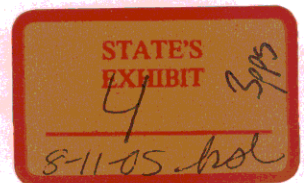
Publication of the public notice of this hearing will appear in the Omaha World Herald dated Monday, July 11, 2005. We are awaiting the Affidavit of Publication. That public notice includes the information required by Sec. 84-907, R.R.S. 1994.

If you have any questions, please feel free to contact Ann Diers in our office.

Sincerely,

David A. Vogler
Legal Counsel

Enclosure



Department of Natural Resources
Rules Regarding the Determination of Fully Appropriated River Basins pursuant to Neb.
Rev. Stat. § 46-713

001 FULLY APPROPRIATED. Pursuant to Neb. Rev. Stat. § 46-713(3) (Reissue 2004, as amended), a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources determines that then-current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

001.01 For purposes of Section 46-713(3)(a), the surface water supply for a river basin, subbasin, or reach shall be deemed insufficient, if, after considering the impact of the lag effect from existing groundwater pumping in the hydrologically connected area that will deplete the water supply within the next 25 years, it is projected that during the period of May 1 through September 30, inclusive, any irrigation right will be unable to divert sufficient surface water to meet on average eighty-five percent of the annual crop irrigation requirement, or, during the period of July 1 through August 31, inclusive, will be unable to divert sufficient surface water to meet at least sixty-five percent of the annual crop irrigation requirement.

For purposes of this rule, the "annual crop irrigation requirement" will be determined by the annual irrigation requirement for corn. This requirement is based on the average evapotranspiration of corn that is fully watered to achieve the maximum yield and average amount of precipitation that is effective in meeting the crop water requirements for the area.

The availability of stream flow will be based on the percentage of time junior rights were able to divert water during the previous 20 year period and the projected impacts of depletions on stream flow from existing wells over the next 25 years.

In the event that the junior water rights are not irrigation rights, the Department will utilize a standard of interference appropriate for the use, taking into account the purpose for which the appropriation was granted.

Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan adopted for a river basin, subbasin or reach determined to be fully appropriated under this rule. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and ground water uses.

001.02 The geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected for the purpose prescribed in Section 46-713(3) is the area within which pumping of a well for 50 years will deplete the river or a base flow tributary thereof by at least 10% of the amount pumped in that time.

002 INFORMATION CONSIDERED. For making preliminary determinations required by Neb. Rev. Stat. Section 46-713 (Reissue 2004, as amended) the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:

Surface water administrative records

Department Hydrographic Reports

Department and United States Geological Survey stream gage records

Department's registered well data base

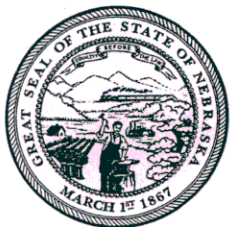
Water level records and maps from Natural Resources Districts, the Department, the University of Nebraska, the United States Geological Survey or other publications subject to peer review

Technical hydrogeological reports from the University of Nebraska, the United States Geological Survey or other publications subject to peer review

Ground water models

Current rules and regulations of the Natural Resources Districts

The Department shall review this list periodically, and will propose amendments to this rule as necessary to incorporate scientific data and information that qualifies for inclusion in this rule, but was not available at the time this rule was adopted.



Dave Heineman
Governor

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES
Roger K. Patterson
Director

IN REPLY TO:
Hand Delivered
July 8, 2005
APD

Senator Patrick Engel, Chairman
Executive Board of the Legislative Council
District #17, State Capitol
P.O. Box 94604
Lincoln, NE 68509-4604

RE: Proposed New Rules and Regulations for Title 460 NAC—Rules Governing the
Administration of the Water Resources Trust Fund

Dear Senator Engel:

Enclosed is a copy of a working draft of rules and regulations being proposed by the Nebraska Department of Natural Resources. These rules and regulations are being proposed in order to implement the provisions of Legislative Bill 962, Section 53, (2004), codified at Neb. Rev. Stat. § 46-713 which provides for the adoption and promulgation of rules by the Department regarding the scientific data and other information used to determine whether a river basin, sub-basin or reach is full appropriated.

The Department will conduct a public hearing on the proposed rules at 1:00 p.m., Thursday, August 11, 2005 at 9:00 a.m., in Kearney, Nebraska.

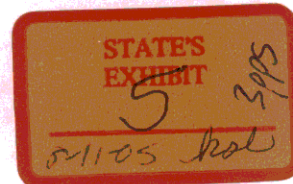
Publication of the public notice of this hearing will appear in the Omaha World Herald dated Monday, July 11, 2005. We are awaiting the Affidavit of Publication. That public notice includes the information required by Sec. 84-907, R.R.S. 1994.

If you have any questions, please feel free to contact Ann Diers in our office.

Sincerely,

David A. Vogler
Legal Counsel

Enclosure



Department of Natural Resources
Rules Regarding the Determination of Fully Appropriated River Basins pursuant to Neb.
Rev. Stat. § 46-713

001 FULLY APPROPRIATED. Pursuant to Neb. Rev. Stat. § 46-713(3) (Reissue 2004, as amended), a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources determines that then-current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

001.01 For purposes of Section 46-713(3)(a), the surface water supply for a river basin, subbasin, or reach shall be deemed insufficient, if, after considering the impact of the lag effect from existing groundwater pumping in the hydrologically connected area that will deplete the water supply within the next 25 years, it is projected that during the period of May 1 through September 30, inclusive, any irrigation right will be unable to divert sufficient surface water to meet on average eighty-five percent of the annual crop irrigation requirement, or, during the period of July 1 through August 31, inclusive, will be unable to divert sufficient surface water to meet at least sixty-five percent of the annual crop irrigation requirement.

For purposes of this rule, the "annual crop irrigation requirement" will be determined by the annual irrigation requirement for corn. This requirement is based on the average evapotranspiration of corn that is fully watered to achieve the maximum yield and average amount of precipitation that is effective in meeting the crop water requirements for the area.

The availability of stream flow will be based on the percentage of time junior rights were able to divert water during the previous 20 year period and the projected impacts of depletions on stream flow from existing wells over the next 25 years.

In the event that the junior water rights are not irrigation rights, the Department will utilize a standard of interference appropriate for the use, taking into account the purpose for which the appropriation was granted.

Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan adopted for a river basin, subbasin or reach determined to be fully appropriated under this rule. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and ground water uses.

001.02 The geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected for the purpose prescribed in Section 46-713(3) is the area within which pumping of a well for 50 years will deplete the river or a base flow tributary thereof by at least 10% of the amount pumped in that time.

002 INFORMATION CONSIDERED. For making preliminary determinations required by Neb. Rev. Stat. Section 46-713 (Reissue 2004, as amended) the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:

Surface water administrative records

Department Hydrographic Reports

Department and United States Geological Survey stream gage records

Department's registered well data base

Water level records and maps from Natural Resources Districts, the Department, the University of Nebraska, the United States Geological Survey or other publications subject to peer review

Technical hydrogeological reports from the University of Nebraska, the United States Geological Survey or other publications subject to peer review

Ground water models

Current rules and regulations of the Natural Resources Districts

The Department shall review this list periodically, and will propose amendments to this rule as necessary to incorporate scientific data and information that qualifies for inclusion in this rule, but was not available at the time this rule was adopted.